BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAWN ELAINE LEWIS-WALLING	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,035,572
JOHNSON COUNTY AND	)	
BOARD OF COMMISSIONERS	)	
Self-Insured Respondent	)	

ORDER

Claimant requested review of Administrative Law Judge Kenneth J. Hursh's October 8, 2012 Award. The Board heard oral argument on March 6, 2013. Judy A. Pope, of Leawood, Kansas, appeared for the claimant. Eric T. Lanham, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

Judge Hursh found claimant sustained injury to her left forearm and left arm, but did not injure her left shoulder, or any level of the spine in the work accident. Judge Hursh awarded benefits to the claimant in the amount of $9,780.75, based upon a split of the impairment ratings provided by Dr. Fevurly and Dr. Poppa.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues she sustained injuries to her neck, upper back, left shoulder, left arm, left wrist and thumb, and requests a new award utilizing Dr. Poppa's rating of 37% body as a whole. Respondent requests the Board affirm Judge Hursh's award in its entirety.

The issues for the Board's review are:

(1) What is the nature and extent of claimant's disability?

(2) Is claimant entitled to payment of outstanding medical bills as authorized?

FINDINGS OF FACT

Claimant has worked for respondent as a juvenile corrections officer for 15 years. On October 14, 2006, claimant was working in the control room when she stood up to speak with a client through a slot in the door. The claimant testified she had been sitting on a new chair with casters and did not realize it rolled so easily. When she went to sit back down, the chair shot out from under her. Claimant fell backwards landing on her left, outstretched hand, and striking the concrete wall with her left elbow and left back shoulder. Claimant testified she injured her left hand, left wrist, left arm, left elbow, left shoulder, shoulder blade and neck.[1]

Claimant initially reported the accident to her shift supervisor, Mr. Mingorance, but when he failed to act on it, she notified the on-duty nurse. The nurse directed her to go to the Olathe Medical Center emergency room for treatment. Although claimant testified she notified hospital personnel of all of her various injuries, they only treated her left thumb as they believed she may have sustained a navicular fracture.

Claimant was then sent to Corporate Care by respondent. Again, claimant testified that she provided a history of the areas of her body that were injured. However, she only received treatment to her left wrist and thumb. After an MRI was ordered showing a possible tear in the triangular fibrocartilage complex (TFCC), claimant was referred to Anne Rosenthal, M.D., an orthopedic surgeon.

Claimant was initially seen by Dr. Rosenthal in November 2006. Claimant testified she told Dr. Rosenthal about all of her injuries; however, treatment focused on her left wrist and thumb. Claimant testified that during the course of treatment, an issue arose wherein Dr. Rosenthal felt she was "faking it" when she failed a grip strength test. Prior to this occurrence, claimant thought Dr. Rosenthal was going to "see about treating the elbow and up the arm."[2] Instead, it was claimant's understanding that Dr. Rosenthal conferred with one of respondent's representatives and claimant was put under video surveillance. After Dr. Rosenthal viewed the video surveillance, she terminated claimant's treatment, lifted all work restrictions and released her at maximum medical improvement in February 2007.

As no additional treatment was authorized by respondent, claimant sought treatment on her own with Dr. Schuchardt, her primary care physician, Drs. Gurley and Deardorff, orthopedic specialists, and Dr. Chandra, a pain management specialist. Claimant testified that she kept respondent apprised of her medical treatment.[3]

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[1] R.H. Trans. at 8-9.

[2] *Id.* at 13.

[3] R.H. Trans. at 25-27.

Claimant testified that Dr. Schuchardt started her on physical therapy and ordered an EMG. Claimant was referred to Dr. Gurley who provided a cortisone injection, physical therapy, work hardening and ordered MRI scans of the left wrist and shoulder. Claimant then saw Dr. Deardorff who continued conservative treatment and referred her to Dr. Chandra for pain management. Dr. Chandra prescribed medications, a TENS unit, and gave injections in claimant's left shoulder. At some point, Dr. Chandra ordered an MRI of claimant's left shoulder which showed a SLAP tear. Claimant was then referred to Dr. Van De Berghe who performed arthroscopic surgery on the left shoulder on August 20, 2008. As claimant experienced additional symptoms in her neck as a result of having to wear a sling during recovery, claimant returned to Dr. Deardorff. Dr. Deardorff performed surgical debridement of the left TFCC and an ulnar shortening osteotomy in November 2008. In March 2009, claimant was released from care.

On January 31, 2012, claimant was seen by Michael J. Poppa, D.O., who is board certified in occupational and preventive medicine, as well as certified as an independent medical examiner, at the request of claimant's attorney. At the time of the evaluation, claimant complained of continued pain and symptoms involving her back, neck, left shoulder, left wrist and left arm, which increased with activity. In reviewing claimant's medical records and the extent of injuries noted therein, Dr. Poppa admitted he found no complaints of the cervical spine/thoracic spine, and the first mention of the left shoulder was in Dr. Rosenthal's note of January 17, 2007, when claimant indicated "she now has pain in the elbow and shoulder on the left as well."

It was Dr. Poppa's opinion that claimant suffered injuries to her cervical spine, thoracic spine, left shoulder, left elbow and left wrist as a result of her work accident on October 14, 2006.

In addressing causation, Dr. Poppa noted in his report:

> [Claimant's] work related injury and employment at Johnson County Kansas was the direct and proximate cause of her resulting work related injury with residuals involving her cervical spine, thoracic spine, left shoulder, left elbow and left wrist. This occurred during the course and scope of her employment. Her employment did cause or substantially contribute to her present conditions, as well as the need for treatment which she received.[4]

At the June 28, 2012 regular hearing, claimant indicated she was still having continued pain and was limited to using her left hand for maybe 20 minutes before having to rest it. Additionally, claimant indicated that buttoning, working with her art, and chopping vegetables are "much more difficult" and the pain "never leaves".

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[4] Poppa Depo., Ex. 2 at 9.

Dr. Poppa's deposition was taken on July 17, 2012. Dr. Poppa testified claimant had received prior treatment for her neck, left shoulder, right shoulder and back, which had resolved satisfactorily, and that claimant was not under active care on October 14, 2006. On cross examination, Dr. Poppa confirmed this information came directly from claimant, as he was not provided a copy of claimant's pre-injury medical records for review.[5]

Dr. Poppa rated the claimant with a 37% impairment to the body as a whole pursuant to the AMA *Guides* (hereinafter the *Guides*),[6] consisting of a 33% left upper extremity impairment for her left forearm (wrist), a 5% impairment of her left upper extremity at the elbow, a 24% left upper extremity impairment to her left shoulder, and a 5% impairment of the whole person involving claimant's cervical spine.

Dr. Poppa opined that claimant was capable of continuing her duties for respondent but should avoid repetitive gripping, avoid working with left arm out away from body, and utilize restraint when lifting, especially above chest level. Furthermore, Dr. Poppa testified claimant will need ongoing care for her cervical spine injury in the form of an outpatient physical therapy program, as well as a TENS unit.

Chris D. Fevurly, M.D., who is board certified in preventative medicine, as well as certified as an independent medical examiner, evaluated the claimant on July 11, 2012, at the request of respondent. At the time of the evaluation, claimant complained of constant pain in her left neck down into the left shoulder, and scapula into the left arm. In reviewing claimant's medical records, Dr. Fevurly noted the records were devoid of any cervical or thoracic complaints and the first mention of any left shoulder problem was Dr. Rosenthal's note of January 17, 2007. Additionally, Dr. Fevurly noted claimant had two MRIs taken of the left shoulder. The first MRI done in 2007 was read as normal and the second MRI done in 2008 was suggestive, although not definitive, of a degenerative SLAP lesion.

It was Dr. Fevurly's opinion that claimant suffered a contusion/sprain/strain of the left wrist and elbow but sustained no injury to the left shoulder or neck as a result of the work accident on October 14, 2006.

Dr. Fevurly's deposition was taken on September 14, 2012. Dr. Fevurly testified that prior to her accident, claimant had several work-related events that caused her chronic recurrent pain. Dr. Fevurly noted these events began in early August, 2002, and continued through much of 2005, with claimant having "significant ongoing pain complaints, mostly

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[5] *Id.* at 23.

[6] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

involving her neck, mid back, and low back, but also involving her upper and lower extremities at times."[7]

In addressing causation, Dr. Fevurly testified as follows:

> Q. Why don't we just cut to the chase, Doctor. On the last page of your report, Page 10, you talk about causation analysis and that's really kind of the main issue in regard to a lot of the complaints she has. What was your opinion with regard to whether or not [claimant] had any medical conditions as a result of this fall?
>
> A. Well, I think the records that I've outlined really are consistent with a contusion sprain/strain of the left wrist and elbow. The records do not support that there was an injury to the shoulder or to the cervical, thoracic spine from the event of October 14th, 2006. I think that she has some degenerative changes in her wrist, mild changes in the TFCC, which were a degenerative tear there. And then eventually after she was released from care with Dr. Rosenthal there was extensive evaluations centered around mostly her left shoulder. That eventually led to surgery.
>
> Q. Do you believe that she sustained any shoulder injury as a result of the fall of October of 2006?
>
> A. I believe the records are consistent with no injury to the left shoulder as a result of the October 14th, 2006, event.[8]

Dr. Fevurly rated the claimant with a 15% left upper extremity impairment pursuant to the *Guides* which was broken down in his report dated July 11, 2012, as follows:

> There is no permanent impairment from the fall on 10/14/06.
>
> Having said that and based on the fact that surgery has been performed to the left wrist and left shoulder, it is reasonable to accord a 5% left upper extremity impairment for the residuals of the left wrist TFCC debridement and an additional 10% left upper extremity impairment for the residuals of the left shoulder SLAP lesion debridement and distal clavicle excision. This can be combined to result in a final rating of 15% upper extremity impairment. This permanent impairment is the natural result of the degenerative process and a consequence of living and aging. It is to be noted that her sculpting activity (use of a chisel and lifting heavy materials) is the biggest risk forward she had for development of these conditions.[9]

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[7] Fevurly Depo. at 9-10.

[8] *Id*. at 21-22.

[9] *Id*., Resp. Ex. B at 11.

In addressing impairment, Dr. Fevurly testified on direct examination as follows:

> Q. Do you believe [claimant] has any impairment as a result of any injuries she sustained in October of 2006?
>
> A. No. I believe that the sprain/strain of the elbow and wrist resolved and the evaluation and treatment after that was really directed to preexisting degenerative problems.[10]

Dr. Fevurly further testified on cross examination as follows:

> Q. You agree that [claimant] does have permanent impairment in the area that you assessed, which is the left arm?
>
> A. Yeah. I accorded impairment, after the surgeries to the left wrist and the fact that she had a TFCC debridement I accorded impairment for the left wrist and then because she had a decompression surgery of the left shoulder I accorded upper extremity impairment for the left shoulder.
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> Q. That was strictly because you were aware that she had had surgery to the left shoulder, but not because you specifically did an assessment of the left shoulder during your rating eval, correct?
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> A. Let me clarify. The reason I did an impairment assessment of the left shoulder is because I figured that this would be in dispute about causation and eventually I would be asked to do an impairment assessment of that, so I went ahead and did it. And I made it clear that I did not believe that the left shoulder was part of the injury on the event of October the 14th, 2006, but I did that so that it would be there in case you guys wanted to, or the Judge eventually decided that there was a left shoulder injury.[11]

Additionally, Dr. Fevurly indicated claimant could return to full and unrestricted activity and there was no indication or expectation for future medical needs.

PRINCIPLES OF LAW

It is claimant's burden to prove her right to an award of compensation by a preponderance of the credible evidence.[12]

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[10] Fevurly Depo. at 22.

[11] *Id*. at 37-38.

[12] K.S.A. 2006 Supp. 44-501(a) and K.S.A. 2006 Supp. 44-508(g).

K.S.A. 44-510d(a) states:

Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . .

(12) For the loss of a forearm, 200 weeks.

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

. . .

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total

> physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

ANALYSIS

The Board adopts Judge Hursh's findings and conclusions and affirms his Award. Judge Hursh was correct in ruling that the initial and contemporaneous medical records were devoid of neck and left shoulder complaints, even though claimant testified that she told Olathe Medical Center, Corporate Care and Dr. Rosenthal about these problems from the beginning of her treatment.

Judge Hursh's logic in concluding that a SLAP lesion noted on a 2008 left shoulder MRI, that was not present on a 2007 left shoulder MRI, tends to show that the SLAP lesion was not due to the October 14, 2006 injury. Similarly, the lack of a radial ulnar joint abnormality in claimant's left wrist MRI shortly after the accident, tends to show that such problem was not the result of the injury, as it was only observed in a 2007 MRI and thereafter. The Board adopts Judge Hursh's conclusions regarding claimant's impairment of function. Claimant's permanent impairment is 7.5% to the left forearm and 2.5% to the left arm.

Regarding unauthorized medical treatment, the Board affirms Judge Hursh's conclusion that medical treatment was authorized and provided. Claimant's testimony that she kept the respondent "apprised" of what she was "going through"[13] does not equate with respondent unreasonably neglecting or refusing to provide medical treatment. Claimant's TFCC surgery was unauthorized.

The Board, however, awards claimant future medical treatment upon proper application to the Director of Workers Compensation.

CONCLUSION

Having reviewed the entire evidentiary file contained herein, the Board finds Judge Hursh's Award should be affirmed, with the exception of granting claimant future medical treatment upon proper application.

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[13] R.H. Trans. at 26.

AWARD

WHEREFORE, the Appeals Board affirms Administrative Law Judge Kenneth J. Hursh's October 8, 2012 Award, with the exception of modifying the Award to include granting claimant future medical treatment upon proper application.

IT IS SO ORDERED.

Dated this _____ day of March, 2013.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

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Honorable Kenneth J. Hursh